

Case No. 18-35708

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PARENTS FOR PRIVACY; KRIS GOLLY and JON GOLLY,
individually and as guardians ad litem for A.G.; NICOLE LILLY;
MELISSA GREGORY, individually and as guardian ad litem for T.F.; and
PARENTS RIGHTS IN EDUCATION, an Oregon nonprofit corporation,

Plaintiffs-Appellants,

v.

DALLAS SCHOOL DISTRICT NO. 2; OREGON DEPARTMENT OF
EDUCATION; GOVERNOR KATE BROWN, in her official capacity as
SUPERINTENDENT OF PUBLIC INSTRUCTION; UNITED STATES
DEPARTMENT OF EDUCATION; BETSY DEVOS, in her official
capacity as United States Secretary of Education as successor to JOHN B.
KING, JR.; UNITED STATES DEPARTMENT OF JUSTICE; JEFF
SESSIONS, in his official capacity as United States Attorney General,
as successor to LORETTA F. LYNCH,

Defendants-Appellees,

BASIC RIGHTS OREGON,

Intervenor-Defendant-Appellee

On Appeal from the United States District Court for the
District of Oregon, Portland Division, No. 3:17-cv-01813-HZ

**BRIEF OF TRANSGENDER STUDENTS AND ALLIES
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES**

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Parents for Privacy v. Dallas School District No. 2,
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Other Sources

Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental
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Brief of Appellants, *Parents for Privacy v. Dallas School District No. 2*,
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Ethan Cicero et al., *Supporting the Health and Well-Being of
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Laura Wernick et al., *Gender Identity Disparities in Bathroom
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Nat'l Educ. Ass'n, *Legal Guidance on Transgender Students' Rights*
(June 2016).....6

S. E. James et al., *The Report of the 2015 U.S. Transgender Survey*,
National Center for Transgender Equality (2016).....5

World Prof'l Ass'n for Transgender Health,
*Standards of Care for the Health of Transsexual, Transgender,
and Gender Nonconforming People* (7th ed. 2012)4

**STATEMENT OF IDENTITY, INTEREST,
AND AUTHORITY TO FILE¹**

Amici transgender students and their cisgender (non-transgender) allies attend or recently attended primary and secondary schools across the territorial jurisdiction of the United States Court of Appeals for the Ninth Circuit. These students are and were directly impacted by their schools' policies regarding transgender students. Therefore, they have a direct interest in the Court rejecting an interpretation of the United States Constitution, Title IX of the Education Amendments of 1972, and state law that would create the limitless privacy right to be free from sharing spaces with transgender people that Plaintiffs-Appellants seek and, as a consequence, engender and embolden discrimination against transgender students.

As demonstrated by the personal histories of *amici*, based on interviews conducted between January and March 2019, transgender students' ability to access educational opportunities depends on whether they are treated consistently with their gender identity. Moreover, all students benefit from nondiscriminatory policies that embrace transgender students and foster a culture of understanding, acceptance, and inclusivity. As recounted below, transgender *amici* who attended

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that the parties in this case have consented to the filing of the brief, no counsel for a party has authored this brief, in whole or in part, and no person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

schools with inclusive and supportive policies that respected their gender identity excelled academically, socially, and personally. In stark contrast, transgender *amici* who attended schools without supportive policies often suffered significant social, emotional, physical, and educational harm.

Likewise, these stories demonstrate that cisgender students are not harmed by sharing space with transgender students. Instead, all students benefit from nondiscriminatory policies that create a supportive environment for transgender students, which enhances their educational experience and prepares them to enter the diverse social and economic fabric of American civic life.

SUMMARY OF ARGUMENT

Transgender students routinely experience discrimination and harassment in their everyday lives on account of their gender identity, something their cisgender peers do not experience. This discrimination can cause significant harm to transgender students' educational, mental, and social development and well-being, and negatively affects their ability to participate fully in educational, civic, and economic life. Some schools — including Dallas School District No. 2 (“Dallas”) — are combatting discrimination by adopting inclusive and supportive policies that do not single out transgender students for separate and disparate treatment. However, some schools refuse to acknowledge transgender students' gender identity, including by prohibiting them from using bathrooms and other facilities

consistent with their genderidentity, or forcing them to use separate spaces, stigmatizing them on the basis of their transgender status, potentially “outing” them against their will to students who were unaware of their transgender status, and exposing them to greater potential risk of harm.

Plaintiffs-Appellants are asking this Court to force Dallas to do exactly that. *See* Brief of Appellants at 9-41, *Parents for Privacy v. Dallas School District No. 2*, No. 18-35708 (9th Cir. Nov. 29, 2018) (Doc. No. 11103084)(“Appellants’ Brief”). Currently, Dallas’s policy does not forcibly segregate, coerce, or compel use of sex-specific facilities for *any* student, whether transgender or cisgender (including the students involved as Plaintiffs-Appellants in this case). *See Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075, 1081, 1083-84 (D. Or. 2018). Instead, any student uncomfortable with using a sex-specific facility — or uncomfortable with the mere presence of transgender students — may choose to use a single-user space, but no student is *forced* or *coerced* to do so. *Id.*

As the stories of *amici* below demonstrate, Plaintiffs-Appellants’ claim that transgender students would suffer “no stigma” by being forced to use segregated single-user facilities because “everyone’s privacy would be preserved” and “all students [are] given the choice to access individualized facilities” (Appellants’ Brief at 50-51) is clearly not accurate. Transgender students are the only ones who are *forced* to use segregated facilities. Plaintiffs-Appellants (indeed, any student) are

able to use either the gender-specific shared facilities *or* the single-user facilities. Plaintiffs-Appellants’ request of this court is that transgender students do not have this choice. As is evident from *amici*’s personal stories below, it is this *compelled* segregation that stigmatizes transgender students by sending the message that they are unsuitable to share facilities used by other students and, in some cases, outs them against their will and exposes them to greater risk of harm.

The medical and scientific consensus is that such discrimination causes significant social and psychological distress for transgender people. Indeed, the ability to live consistently with one’s gender identity, including using bathrooms and other sex-specific facilities, is a critical part of treatment for gender dysphoria — the medical diagnosis for those who experience clinically significant distress caused by “the incongruence between [their] experienced or expressed gender and [their] assigned gender” (which not all transgender people suffer). Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders: Gender Dysphoria 451 (5th ed. 2013); *see also* World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 9-10, 58-61 (7th ed. 2012) (discussing treatment options). When allowed to socially transition, transgender youth report similar levels of depression and other harmful emotions as their cisgender peers, compared to “markedly higher rates of anxiety and depression and lower self-worth” among transgender youth with

dysphoria who have not socially transitioned. Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56(2) *J. Am. Acad. Child & Adolescent Psychiatry* 116, 120 (2017).

For transgender youth, policies affecting them at school, where they spend significant portions of their young lives, have long-lasting educational, mental, emotional, and social effects. See Joseph Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 93, GLSEN (2018) (“[o]verall, transgender students were more likely than all other students to have negative experiences at school,” including verbal and physical harassment and assault); Jaimie Veale et al., *Enacted Stigma, Mental Health, and Protective Factors Among Transgender Youth in Canada*, 2 *Transgender Health* 207, 214 (2017) (reporting “greatly reduced likelihood of negative mental health outcomes” for transgender youth in supportive schools “even when they experienced stigma and discrimination elsewhere”); Marla Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/Gender Nonconforming Adolescents*, 61 *J. of Adolescent Health* 521, 524 (2017) (describing prevalence of suicidal ideation and attempt among transgender youth as “a call to action for ... school personnel ... to recognize, support, and protect these vulnerable youth”); S. E. James et al., *The Report of the 2015 U.S. Transgender Survey* 137, National Center for Transgender Equality (2016) (negative school

experiences are “correlated with a variety of poor outcomes, such as higher rates of attempted suicide, homelessness, and serious psychological distress”).

Given the stark differences in outcomes for transgender students, schools should and can avoid these negative outcomes with solutions such as those in place at Dallas. See Nat’l Educ. Ass’n, *Legal Guidance on Transgender Students’ Rights* 24 (June 2016) (“It is essential to the health and well-being of transgender people for them to be able to live in accordance with their internal gender identity in all aspects of life and restroom usage is a necessary part of that experience.”); Ethan Cicero et al., *Supporting the Health and Well-Being of Transgender Students*, 33(2) J. School Nursing 95, 106 (2017) (forcing transgender students to use separate bathrooms can “create unsafe conditions for transgender students as others will be able to identify them as trans or remotely located bathrooms produce accessibility challenges and consequences for being tardy to class”); Laura Wernick et al., *Gender Identity Disparities in Bathroom Safety and Wellbeing among High School Students*, 46 J. Youth Adolescence 917, 928 (2017) (suggesting students “use a bathroom that matches their identity” because “safety using bathroom facilities mediates the inequalities in overall school safety experienced by trans students” and is necessary “to support the wellbeing and healthy development of all students”).

Amici’s experiences recounted below are consistent with these educational, social, and medical outcomes and demonstrate how critical it is to transgender

students' development and well-being to attend a school free of discrimination that allows them to live consistently with their gender identity in all respects. Several *amici* reported positive experiences in school after coming out as transgender. For these students, their schools supported them and fostered an environment in which transgender students thrived socially and academically. Following the lead of these educators, other students embraced their transgender peers for who they are. The shared experience of these transgender students and their cisgender classmates incentivized learning, tolerance, and compassion, attributes that well prepare all of these students for the rest of their lives.

Other *amici*, however, were forbidden from using facilities consistent with their gender identity or forced to use separate bathroom facilities, segregating them, involuntarily outing them as transgender to fellow students, and subjecting them to increasing levels of harassment and violence. Transgender students forced to endure these hostile environments often avoided using bathrooms during school, leading to discomfort and harmful medical consequences. They often time bathroom breaks during class to avoid anyone seeing them enter segregated, single-user bathrooms, suffering academically and socially. Some students developed anxiety, depression, and engaged in self-harm. These negative outcomes are sadly common among transgender individuals in these environments.

Allowing transgender students to use facilities consistent with their gender

identity and appearance, as does Dallas, provides transgender and cisgender students alike an atmosphere most conducive to the educational experience of all students. The claims of purported harm espoused by Plaintiffs-Appellants — based on carbon copy claims of outcomes that actually befall transgender students, not cisgender students, including educational and medical outcomes based on exclusionary bathroom policies — starkly contrast with the very real and lasting harm that exclusionary policies inflict upon transgender students, which contribute to bullying and harassment, and deprive them of the right to participate fully in their education.

ARGUMENT

The consensus of the medical and scientific community and many educators across the Ninth Circuit (and the country) is that it is necessary to the health and well-being of transgender people for them to live and be treated consistently with their gender identity in all respects, including when using sex-specific facilities in schools. The experiences of *amici* recounted below bear this out.

I. SUPPORTIVE POLICIES AND SCHOOL ADMINISTRATIONS DRAMATICALLY IMPROVE TRANSGENDER STUDENTS' LIVES AND EDUCATIONAL EXPERIENCES

The following *amicus*, a transgender student from Oregon reported that her school was supportive and treated her in accordance with her gender identity. Her story is the textbook example of how the adoption of inclusive school policies, including the ability to use facilities consistent with students' gender identities, are

critical to the educational, social, and mental well-being, and lead to excellent outcomes for both transgender and cisgender students alike.

C.S., Portland, Oregon²

C.S. is a 20-year-old female graduate of a high school in Portland, Oregon. C.S. is currently a junior at the Massachusetts Institute of Technology (MIT) where she is studying computer science and is considering attending for an extra year to attain a dual major in MIT's AeroAstro engineering program (aerospace engineering). C.S. attended a high school that was very supportive of her gender identity in all respects, and had family and friends who offered the same level of support. C.S. believes this support was necessary to her educational and social success. Indeed, C.S. remarked that she feels "pretty lucky" as she has transgender friends whose lives have been "derailed" or, at least, made significantly more challenging due to a lack of the educational and social support she had.

C.S. was designated male at birth and started to understand that her gender identity did not match that designation in the spring of her sophomore year of high school. However, at that time, C.S. did not understand exactly how to describe her gender identity: "I understood the concept of gender identity before, but I was not sure how to actually tell. I started to think I might be a different gender" (than what

² This narrative is based on a telephone interview of C.S. on March 3, 2019 and email on March 5, 2019. Some *amici* are referred to by their initials to protect their identity and safety.

had been marked on her birth certificate). C.S.'s mother noticed C.S.'s discomfort and, in the fall of her junior year, while helping C.S. put together a costume to transform C.S. into a female character for Halloween, C.S. and her mother began discussing C.S.'s gender identity. C.S. started speaking to a counseling service provider in Portland that specifically supports transgender youth. She soon understood what she had been feeling — that she was female.

C.S. began to change her dress and appearance to a more gender neutral style. Previously, although she had dressed in traditionally male clothing, she wore baggy clothes and sweatshirts to hide her body, because she felt uncomfortable in her body. In the summer between junior and senior year of high school, C.S. transitioned her appearance to reflect her female gender identity and came out to family, friends, and at her high school. C.S. does not recall any significant or even particularly memorable issues, which she partly attributes to the fact that others at the school had come out as transgender previously. In C.S.'s view, the school already knew what it was doing and how to treat transgender students. C.S.'s school used her correct name and female pronouns, and treated her in all respects in accordance with her gender identity.

While C.S. recalls that some individuals accidentally slipped up and used C.S.'s prior name and pronouns at first, she was soon simply treated as the girl that she was. In fact, C.S. does not recall bullying, which she attributes to the school

administration's consistent messaging that any bullying, of any student, would not be tolerated. Although C.S. began senior year by using gender neutral bathrooms due largely to her own nervousness, she began using the female facilities at her school by the end of the school year and had no issues at all.

C.S. remarked that, given the familial, social, and educational support she received, she had "no academic repercussions when coming out." Her grades and studies remained consistent and excellent. She also continued her leadership role on the school's robotics team, where the students designed and built remote controlled robots over a six week build season and then competed against other teams and schools at competitions. In her senior year, C.S. was one of its leaders and was one of the individuals who wrote the software to control the robot. In the spring of 2016, her senior year, her team advanced to the FIRST ("For Inspiration and Recognition of Science and Technology") world robotics championship in St. Louis. While travelling with the team, C.S. was treated consistently with her gender identity and shared accommodations with the other girls on her team.

When planning the trips, no one wanted to treat C.S. as anything other than the girl that she was. It was more important that the robotics team do well in the competition. In fact, I.W., one of the cisgender female members on the robotics team and C.S.'s roommate during the competition, who now attends Caltech, recalls

that C.S.'s transgender status was "not even a fact that we considered."³ To I.W. and the rest of the team, C.S. was "a member of our team, who we grew up with and trusted," and I.W. would "just as rather share a room with her as anyone else" on the team. C.S.'s other cisgender roommate, A.D., expressed similar sentiments about the trip and sharing the experience with C.S., whose gender identity was embraced by her team and her school: "We were excited to be there as a team of women where the robotics teams were not typically women in that environment."⁴

Similarly, C.S. recalls attending her school's class trip in senior year, where she likewise was treated consistently with her gender identity. During an overnight community service trip, where C.S.'s school worked to repair fences for wildlife conservation, she stayed in the cabins with all of the other girls. There were never any issues.

C.S. remembers that she personally felt nervous from time to time, which she understands many transgender students experience as they come out and live their lives, but C.S. was largely supported by her school and peers. She recalls only occasional comments and negativity directed towards her that were handled well by the school. This experience in high school gave her the ability to "understand how

³ This narrative is based on a telephone interview of I.W. on March 5, 2019 and email on March 5-6, 2019.

⁴ This narrative is based on a telephone interview of A.D. on March 6, 2019 and email on March 6-7, 2019.

to deal with awkwardness, and I would have had much more difficulty adjusting if I had not been able to come out when I did.” This support and understanding also improved the experience of C.S.’s cisgender friends. I.W. explained that “having teachers that could accept so readily equipped them to handle these experiences over the rest of their lives” and I.W. was “really grateful that I was part of a school community that did not get hung up on someone’s transgender status.”

That support enabled C.S. to focus on her academics and extracurricular activities — robotics and computer programming, which directly led to her academic choice when she enrolled at MIT. At college, C.S. is also treated in all respects consistently with her gender identity. She stays in a dormitory with gender-neutral bathroom facilities but uses the women’s bathroom elsewhere on campus. C.S. also has eight credits of mandatory physical education and a swim class, for which she utilizes the women’s locker rooms. Along with many other students who wish to protect their privacy, transgender and cisgender alike, C.S. often uses a stall to change for these classes. Similar to high school, she has not experienced any issues or discrimination from her school or her peers. As a result, she is able to simply focus her attention on her education. C.S. is thankful, and explains: “A lot of other transgender students have struggled and have not gotten the opportunities I have received because they did not have a supportive school.”

* * * * *

C.S.'s account demonstrates that transgender students (and their cisgender peers) thrive under inclusive and nondiscriminatory school policies. Supportive schools also improve transgender students' mental and emotional health, and allow students to focus on their schoolwork rather than worry about how they may be perceived by other students. Being able to live their lives without navigating the shame and stigma of being forcibly isolated from their peers when they perform the most basic, everyday functions are critical to providing full access to educational opportunity for these students, as Dallas has recognized and implemented.

II. DISCRIMINATORY POLICIES SIGNIFICANTLY IMPAIR TRANSGENDER STUDENTS' EDUCATIONAL EXPERIENCES AND MENTAL AND SOCIAL WELL-BEING

In stark contrast, other *amici* faced discriminatory school policies that barred them from using bathrooms and other facilities that their peers used, failed to protect them and provide an environment conducive to their education, and damage their personal, mental, and social well-being. The support, or lack thereof, highlights how critical supportive, nondiscriminatory policies, treating transgender students consistently with their gender identities in all respects, truly are.

K.E., Southwest of Boise, Idaho⁵

K.E. is a 16-year-old male student enrolled as a junior in a high school

⁵ This narrative is based on a telephone interview of K.E., and his mother, A.L., on January 19, 2019 and email on March 5, 2019.

southwest of Boise, Idaho. K.E. is now the President of his high school's gay-straight alliance (“GSA”) and regularly participates in art and creative writing programs at his school and as extracurricular activities. K.E. hopes to attend college in California when he graduates and currently intends to become either an illustrator, or a therapist so that he can give back and help other LGBTQ youth like him. K.E. attributes his recent educational and social success to the support he has received from his mother, friends, and from his school — although there are a few areas, including facilities usage, where his school can still improve.

K.E. was designated female at birth, and first started asking questions about his gender between grades eight and nine. He realized he was different but was confused what that meant for him and “did not have the language to describe” himself at that time or “define [his] identity.” K.E. also felt “very repressed in middle school and wanted to figure out” why he felt this way. In fact, he began to develop anxiety and depression around this time, leading up to occasional feelings of self-harm, for which he sought and received some mental health counseling — although he observed that “at the time, I did not link it” to his gender identity.

K.E.’s mother explained that, although she was uncertain why, “a mom knows” when something was wrong and recognized that, instead of being happy growing up as K.E. was when he was younger, she “observed him being mortified” at looking and being considered female (because, as K.E. would later explain, he

was not female). Indeed, in the fall of his freshman year, K.E. told his counselor that he was transgender. In the spring of his freshman year, he told his parents.

In the summer between ninth and tenth grade, K.E. came out to his friends and extended family, and by August 2017, his sophomore year, came out publicly, including over social media. The school community generally accepted K.E., despite some difficulty having K.E.'s name changed on official records and getting the rest of the student body and teaching staff to use the correct pronouns and name. As K.E. observed though, “nobody gives you a handbook of what to do at school” and found that the difficult process of navigating the school and his peers’ perception of him took him to a better place. Given this support from his student peers, and most of his teachers, K.E. grew into a much happier person. His relationships with his friends improved and became closer now that K.E. did not feel he was hiding. His mental health greatly improved. K.E.’s mother finally saw him “come out of his shell” and take a turn “for the positive.”

Yet, K.E. still faces daily struggles. Although originally seeming to take steps towards creating supportive policies regarding its treatment of its students consistent with their gender identities, his school does not have a policy allowing transgender students to use facilities consistent with their gender identities. K.E. is not allowed to use the gender-specific facilities consistent with his gender identity and how he is perceived — male. In fact, many of his peers do not know that he is

transgender unless they know him personally. Since using the girls' facilities is clearly not an option, K.E. is forced to use a referee bathroom near the school's locker rooms or the nurse's bathroom (but only if the nurse is there and no other student is present). One of K.E.'s peers who is also transgender was told that he could not use either the men's or the women's bathrooms — caught between a policy that would not treat him consistently with his gender identity and the reality that the perception of him as male by his peers meant he cannot use women's bathrooms.

While getting a key for the referee's bathroom or using the nurse's bathroom is also time-consuming and complicated, the requirement to use separate bathrooms is stigmatizing for transgender students and “outs” them to their peers. K.E. notes that the referee bathrooms are now generally known as the “trans bathrooms” at school. K.E. explains that, for transgender students, this creates a lot of fear that other students who may not be aware of a student's transgender status may see them using these bathrooms and “put the dots together.” K.E. has personally experienced this fear and discomfort as other students have seen him go into these bathrooms.

Sometimes it is simply not possible to find a teacher to unlock these bathrooms, they are in use, or they are simply too far away to make it to them and back to class in time, and K.E. is forced to use the girls' bathroom. K.E. feels that he often has to use the girl's bathroom because he “does not want to miss class and

upset his teachers” and that, as a consequence, using the bathroom “is a chore.” K.E. keeps a “timetable in his brain” of when he is least likely to encounter people in the bathroom, including during class. If he hears girls in the bathroom, he will wait in the stall until others leave to avoid the looks he gets from female students that communicate to him he is not welcome there. K.E. agrees that he should not use the girls’ bathroom, but is prevented from doing otherwise by the school’s policy. Sometimes, it is too much for K.E. who remarks that there is so much “additional stress in figuring out which bathroom to try and use” when “no one else has a second thought.” On those days, K.E. will simply hold it and avoid the bathroom, at least until he can drive off campus at lunch to a Subway restaurant or gas station where there is a single use bathroom he does not have to enter in front of all of his peers.

Similarly, the use of locker rooms is not possible for K.E., despite that K.E. used to love participating in cross country. Because K.E. could no longer compete on the girls’ team and could not use any of the boys’ facilities, K.E. felt no choice but to give up on his love for cross country. K.E. recounted a news story he read about a transgender wrestler in a high school in Texas and all the “challenges he dealt with” and so “did not even want to try it.”

Despite these challenges, K.E. feels somewhat lucky in comparison to stories he has heard about transgender students from less supportive schools. He believes

the school at least has set a culture where bullying will not be tolerated and, although he has heard disparaging remarks and derogatory terms about LGBTQ people, he has mostly escaped any bullying. K.E. believes that the school's decision to allow his peers to have a GSA (despite initial resistance), participate in the homecoming parade, and participate in other school activities with the GSA, has created an atmosphere that is "more welcoming" and one in which he hears "a lot less homophobic or transphobic language and jokes" than he expected. "I have been pretty lucky," K.E. explains, and he hopes that future transgender students will have a more supportive environment that respects them and treats them consistently with their gender identity in all respects.

J.B., San Francisco, CA⁶

J.B. is a 10-year-old transgender, non-binary student currently enrolled in grade five in a private middle school. Although J.B. was designated male at birth, as long as J.B. can remember — as early as 3, according to J.B.'s mother — J.B. believed and expressed that the designation on J.B.'s birth certificate did not reflect who J.B. actually is. J.B. consistently explained that J.B. was non-binary "because this is how God made me."

Over the past 7 years, J.B.'s interests have changed, as any child's interests

⁶ This narrative is based on a telephone interview of J.B., and J.B.'s mother, N.B., on February 26, 2019 and email on March 6, 2019.

change, but J.B.'s gender identity has remained consistent. J.B. has developed interests in video gaming, technology, and computer programming, after learning about gaming development through Minecraft. J.B. wants to be the first non-binary gamer to win a video game tournament and wants to develop video games. Ever the gregarious youngster, J.B. also stays engaged in other extracurricular activities including basketball, rock climbing, and parkour. With the support J.B. has received from family and a new school, J.B. has blossomed and is doing well.

Things were not always this simple, or good, for J.B. J.B. originally attended a public school in the San Francisco area where J.B. suffered extreme bullying, including verbal, emotional, and even physical violence, including being kicked, punched, pushed to the ground and into the mud, and even threatened with broken glass. J.B. suffered this bullying from both boys and girls, and there were few places J.B. could turn for help while at school. The school did little to stop the bullying, often treating the bullying as though it were a “mutual conflict,” as J.B.'s mother put it, and the fault of both children — the bully and the victim. J.B. explained how hard it was for J.B. to be “made to apologize for others’ bullying.”

J.B. typically used a single-use or gender-neutral bathroom, to the extent J.B. could find one that was unlocked or available. Often, those bathrooms were neither. The single-use bathroom J.B. typically would use kept getting “accidentally locked” due to “mechanical issues” with the door; after this occurred multiple times, J.B.'s

mother provided a doctor's note to the school indicating that J.B. needed access to a bathroom at all times, and these "mechanical issues" disappeared and did not reoccur. The driving decision in facilities usage was J.B.'s own safety, and J.B. often had to make the tough decision about which bathroom was safest, a decision-making process J.B.'s mother observed other kids do not even have to consider. Often, the school provided no bathroom that felt safe and J.B. would hold it and avoid the bathroom for the entire day, causing numerous health complications for which the family had to seek medical attention.

Eventually, J.B. was unable to focus on school and J.B. began to struggle. J.B.'s mother recounts that one of the hardest parts to watch was to see her naturally happy child grow agitated and anxious, disappearing before her eyes. After attempts to create a more positive school environment for J.B. failed and the bullying got worse (leading to one visit to an emergency room after J.B. was punched in the eye), J.B. was pulled out of public school at the start of third grade and began home schooling.

For the next year and a half, J.B. was homeschooled, avoiding the challenges J.B. faced at public school and now able to focus on an education, rather than on everything else that got in the way. Although J.B.'s mental health and focus on academics improved, J.B. still missed the social aspect of school. Luckily, J.B.'s mother was able to enroll J.B. in a progressive middle school (for ages 10 through

13) in the midst of fifth grade.

J.B.'s new school is worlds apart from J.B.'s last public school. The school is educated on, and affirming of, LGBTQ issues, and specifically transgender and non-binary students. J.B. has never experienced bullying at this new school and has always been called the correct name. J.B.'s gender identity has always been respected and J.B. has been able to be open and conversational with the school's teachers and staff. J.B. has never encountered a locked bathroom at the school, can use the facilities without worry, and has never felt so scared that "holding it" is the only option.

J.B. has also started attending youth camps outside San Francisco that are welcoming and trained on issues of diversity and gender identity. J.B. enjoys participating in activities with other kids and has encountered nothing but respect. J.B.'s mother noted that the camp has taken steps to provide for all children, including bathrooms and other facilities, and how the tone of respect set from the top has fostered a culture of respect.

J.B.'s mother has seen a marked improvement, noting that J.B. is back to being the "happy, easygoing kid" she remembers and that the new schooling environment has "made learning better and easier, and J.B.'s focus has grown." J.B. finally is "able to relax" and simply be a kid at school, getting an education, surrounded by peers who treat each other with respect and dignity despite their

differences. Where before there was fear, J.B.'s mother characterizes J.B.'s new outlook on life as "watch out world, here I come." J.B. is also happy with the new arrangement. J.B. explains that "home school was great" but J.B.'s new school allows J.B. to be around and interact with other students, including other transgender students. Most importantly, according to J.B., "they accept me." Unlike before, J.B. now likes to go to school, and looks forward to getting an education where J.B. feels safe and comfortable learning.

Michael SunBear Standing Rock, Northwest of Missoula, Montana⁷

Michael SunBear Standing Rock is an 18-year-old male senior in a high school northwest of Missoula, Montana. Michael has not had a supportive educational environment, which has led to a very difficult personal and academic journey. At this point, so close to graduation, Michael has "come to just not care" about how people think of him. Instead, he has surrounded himself with friends that do support him, has strengthened his relationship with his mother (with whom he lives), and is working to make it to graduation and the next phase of his life. Michael looks forward to enrolling in a culinary arts program at a university in Montana and then to the Culinary Institute of America. Michael has dreams of being a five-star chef on the world stage.

⁷ This narrative is based on a telephone interview of Michael on March 4, 2019 and email on March 6, 2019.

Michael was designated female at birth. He realized he was different, but denied to himself that he was anything other than female for much of middle school and early high school. At the time, Michael was attending a public school in Missoula, Montana, and, by 2016, Michael knew of a number of other students in Missoula who had come out as transgender. Although Michael was in “deep denial about being transgender,” the visibility of these other students combined with the fact that Michael “was not comfortable” with himself caused him to reflect on who he really was. After he was forced to wear a dress and makeup for school pictures in September of 2016, the beginning of his sophomore year, Michael could no longer “deny what is true” about himself.

Michael began coming out as transgender to friends and certain staff at his school. His school in Missoula was generally supportive, and its principal told Michael he could use the male facilities, which made him feel most safe and comfortable and corresponded with Michael’s male gender identity. However, this initial bit of hope did not last.

When Michael came out to his family, he endured a rocky start. He was originally sent by his father, who does not live in Montana, to a mental health treatment facility in December 2016. Michael did not want to be pulled out of school or attend this facility, where he believed the intention was to “convert me back into a girl” and that it was a “punishment for coming out.” After a month of

begging to leave, Michael went to live with his mother outside of Missoula. Michael has since been diagnosed with gender dysphoria and is undergoing treatments (including hormonal treatments, which he recently started).

Michael enrolled in a new high school northwest of Missoula. Although Michael was male and presented as male when he first enrolled at his new high school, he soon realized he would not be treated in accordance with his gender identity. On the first day at his new school, Michael went into a boys' bathroom just to wash black marker off his hands; by the end of the day, he had been called in by the administration and reprimanded for using the bathroom. Michael was told he had to use the teacher's bathroom or a separate single-use, wheelchair-accessible bathroom stall. However, the single-use bathroom stall was often in a state of disrepair or had not been cleaned. When he raised these issues with a teacher, the teacher asked him "do I look like the janitor?" and did nothing.

Soon, some teachers would follow Michael or watch him when he was in the hallways, apparently to ensure he would not use the boys' bathroom. So Michael tried to avoid using the bathroom at school. Michael "feels like no one is protecting me, the teachers yell at me," and there are no teachers "who are supportive" of him. Michael believes that if he speaks out, he will receive "disorderly conduct" citations from the administration, which has previously occurred. So Michael avoids teachers and staff as much as possible.

Michael also regularly endures taunts from other students, including being told that “I should kill myself,” and he feels that there is nothing he can do. Michael feels that he “is in danger” and tries to avoid interactions as much as possible. Thankfully, some classmates have “come around” and respect Michael for who he is. But at this point, so close to graduation, Michael “avoids everyone that is not already a friend.”

Michael’s mother has grown to be supportive of Michael, including of his recent hormone treatments. Michael is also gradually reestablishing his relationship with his father. Michael hopes that his family, peers, and school can come to respect him for who he is, as he hopes for all students, transgender and cisgender, and that schools can be safe places. To accomplish that, Michael believes, people need to start understanding that “transgender rights are human rights” and that people should be treated as human beings first and foremost.

* * * * *

The experiences of *amici* are all too common. Even where schools accept transgender students in some respects, but not all (for example, usage of facilities on an equal basis), they demonstrate that discriminatory and exclusionary school policies stigmatize, humiliate, and out transgender students to their classmates, and significantly impair their ability to receive an education on equal terms as their peers. These policies can cause some students to leave school to avoid these

humiliating and painful experiences. These policies can also “out” students as transgender to those who were unaware, as well as increase bullying, harassment, and even physical violence, communicating an official message that discrimination against transgender students is acceptable.

CONCLUSION

Amici's accounts demonstrate that school policies, including regarding bathroom use, have very real and lasting consequences for transgender students. These are simply not shared by cisgender students such as Plaintiffs-Appellants here, who do not suffer discrimination based on their gender identity. When schools' policies are unsupportive and discriminatory, transgender students struggle socially, medically, psychologically, and academically. But when schools treat transgender students consistently with their gender identity in all respects, they thrive, and so do their peers. For these reasons, *amici* respectfully urge this Court to affirm the decision of the District of Oregon, which denied Plaintiffs-Appellants' request to reverse Dallas's supportive policies for transgender students and instead ban them from using facilities used by their cisgender peers.

Dated: March 8, 2019

Respectfully submitted,

/s/ Jesse Ryan Loffler_____

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CERTIFICATE OF COMPLIANCE

I am counsel for *amici curiae* in the above-captioned matter and certify pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), 32(a)(7), and 32(g)(1) that the foregoing Brief of Transgender Students and Allies as *Amici Curiae* in Support of Defendants-Appellees is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 6,500 words, excluding those sections identified in Fed. R. App. P. 32(f).

Dated: March 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on March 8, 2019, I filed the foregoing Brief of Transgender Students and Allies as *Amici Curiae* in Support of Defendant-Appellees using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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